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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (App. 210-229) is reported at 422 F.2d 979. The findings of fact, conclusions of law, and judgment of the District Court (App. 200-207) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1970 (App. 230). The petition for a writ of certiorari was filed on May 26, 1970 and was granted on October 12, 1970. 39 *U.S. Law Week* 3131. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioner railroad sought an injunction against a strike by respondent union on the ground that the union had not satisfied the "major disputes" requirements of the Railway Labor Act (45 U.S.C. §§ 151-160). The railroad charged that, while the union had purported to comply with the provisions of that Act respecting conferences (Section 6, 45 U.S.C. § 156) and mediation (Section 5, 45 U.S.C. § 155), it had not substantially fulfilled either those obligations or its duty under Section 2 First of the Act (45 U.S.C. § 152 First), because it had not within the meaning of this last provision "exert[ed] every reasonable effort to make and maintain agreements . . . and to settle all disputes." The question presented is whether the courts have jurisdiction to entertain such a claim.

STATUTES INVOLVED

The statutory provisions principally involved are Sections 2 First, 5 First, and 6 of the Railway Labor Act. They provide as follows:

Section 2 First (45 U.S.C. § 152 First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising

out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 5 First (45 U.S.C. § 155 First):

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period

the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6 (45 U.S.C. § 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

STATEMENT

The single issue presented in this case is whether the courts have jurisdiction to entertain claims based on Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First), the so-called "good faith bargaining" provision. The lower courts held that they were without jurisdiction and therefore never reached the further question whether in fact there had been a violation of that provision in the case at bar. In

these circumstances, the essential facts are simply these:

Petitioner Chicago and North Western Railway Company (the "C&NW") sued in District Court to enjoin a strike threatened by respondent United Transportation Union (the "UTU").[1] By the time of the suit, the National Mediation Board, acting pursuant to Section 5 of the Railway Labor Act, had terminated its services respecting the labor dispute between the parties, and the prescribed 30-day "cooling off" period had expired (45 U.S.C. § 155). However, the C&NW claimed that the UTU had not met the prerequisites to a lawful strike because it had not, within the meaning of Section 2 First of the Act, "exert[ed] every reasonable effort" to resolve its dispute with the railroad. Accordingly, the C&NW maintained, there had been only ostensible, not real, compliance by the UTU with the obligations imposed by the Act for conferences between the parties and mediation of the dispute (45 U.S.C. §§ 155, 156). After a preliminary injunction hearing during which the C&NW introduced its evidence, the District Court granted the UTU's motion to dismiss on the ground that the duties laid upon the parties by Section 2 First are enforceable exclusively by the National Mediation Board and not in any respect by the courts. The Court of Appeals affirmed on the same ground. This Court granted certiorari to determine the correctness of that holding.

In more detail, the background of this litigation is as follows:

1. *The 1965 Section 6 notices.* The dispute between the parties concerns how many brakemen should be

[1] Jurisdiction was grounded upon 28 U.S.C. §§ 1331, 1337.

employed on the C&NW's trains—the "crew consist" controversy. In 1965, the UTU served upon the C&NW notices under Section 6 of the Railway Labor Act proposing that not less than two brakemen be employed on every crew. Under that proposal, an additional brakeman would be required on some 200 crews at a cost of close to $2,000,000 annually. The C&NW responded by serving notices proposing that crew size be determined by management. (App. 5-6, 31, 32, 48-54, 56, 106.)

2. *Antecedents of the dispute.* The 1965 dispute had its origins in a similar dispute that arose in 1959-1960. At that time, the nation's railroads and the unions representing operating employees had exchanged notices respecting "manning" issues, including the use of firemen on diesel locomotives and the number of brakemen required on trains.[2] In 1961, the President appointed a special commission to help resolve this abrasive controversy. After extensive hearings, the Presidential Railroad Commission found that all fireman and many brakeman positions were unnecessary, and that accordingly the railroads should be free to reduce their work forces if certain protections were extended to existing employees. *Report of the Presidential Railroad Commission* (1962), pp. 21-63. While the railroads accepted the Report, the unions rejected it. (App. 12-14.)

Subsequent mediation by the National Mediation Board proved unsuccessful, and the carriers announced that they intended to put their proposals into effect.

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[2] There were then five unions of operating employees. On January 1, 1969, all but the Brotherhood of Locomotive Engineers merged into respondent UTU (App. 12). For simplicity we refer herein only to the UTU.

The unions' legal effort to block that action ended when this Court held that the parties were free to resort to "self-help" because the procedures of the Act had been exhausted. *Brotherhood of Locomotive Eng'rs* v. *Baltimore & O. R.R.*, 372 U.S. 284 (1963). The President then appointed an emergency board under Section 10 of the Act (45 U.S.C. § 160). Neither that board nor the Secretary of Labor, who tried to mediate, could bring about a settlement. The President then sought, and the Congress enacted, compulsory arbitration legislation. 77 Stat. 132 (1963). (App. 14-16.)

Arbitration Board No. 282, which was established pursuant to the legislation, authorized each railroad to eliminate 90% of fireman positions and to institute local negotiation, and if necessary local arbitration, for eliminating brakeman positions. National guidelines were established to govern the crew consist negotiations and arbitrations, and generous protection was provided for existing employees.[3] Pursuant to this award, some 8,000 brakeman positions were eliminated across the country.[4] On the C&NW, agreements and arbitrations authorized the operation of about 200

[3] In the decision upholding the validity of the award, the District Court, in an opinion adopted by the Court of Appeals, observed that the "board displayed extreme consideration and even benevolence for the future of employees in regular service," and that the "well-reasoned opinion of the board convincingly shows that the board thoroughly weighed the evidence and that there was a rational basis for its conclusions." *Brotherhood of Locomotive Fire. & Eng.* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11, 18 (D. D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. den.*, 377 U.S. 918 (1964).

[4] Some 18,000 fireman positions were also eliminated. See *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 591 (D.C. Cir. 1967).

crews with one, rather than two, brakemen. While some of these positions had to be held open for protected employees, just before this suit the C&NW was operating some 179 crews with a single brakeman, thereby realizing savings at a rate of over $1,500,000 a year. (App. 16-17, 29-31, 55-56; Tr. 75.)

3. *The UTU's attack on the rules established by Award 282.* The UTU pursued two avenues in its effort to win back the positions lost as a result of Award 282. First, the UTU contended that, upon the expiration of the award on January 25, 1966, the old crew consist rules would automatically revive so that the railroads would be obliged to restore some 8,000 brakeman positions immediately. However, the courts rejected this argument, holding that the rules established under the award survived its expiration and could be changed only in the manner prescribed by the Railway Labor Act. *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967). (App. 19-20.)[5]

Second, prior to the expiration of the Award, the UTU served upon a large number of railroads Section 6 notices calling for a second brakeman on virtually all crews.[6] Such a notice was served on the

[5] A similar ruling was made respecting the fireman issue. The fireman controversy thereafter followed a different course than the crew consist dispute, and since it is not relevant here we will not further refer to it.

[6] The railroads took the position that bargaining over the UTU's new crew consist notices was not obligatory until after the expiration of the award. In the *Akron & B.B. R.R. case, supra*, the court held that by adopting this position the railroads had "failed to make every reasonable effort to settle" the dispute in violation of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108). 385 F.2d at 594-99. The UTU contended below that this violation in

C&NW and triggered the dispute that ultimately led to this litigation. Upon service of their counter-notices, the carriers proposed national negotiations in accord with past practice respecting similar national crew consist disputes, but the UTU insisted upon negotiations on a carrier-by-carrier basis. The UTU's acknowledged purpose in repudiating national handling was to insure that the procedures of the Railway Labor Act would be exhausted on different railroads at different times so that the UTU would be able to engage in a sequence of "whipsaw" strikes against individual railroads—an especially effective weapon against the railroads in view of the intensive competition in the transportation industry, the inability of railroads to build up in advance of a strike an "inventory" of their product, and the precarious financial condition of the carriers. (App. 18-19, 31-32; J. E. Wolfe Aff. ¶ 40.)

When the UTU had exhausted the formal procedures of the Act upon three railroads, those railroads sued to enjoin a threatened strike on the ground that the UTU had violated the Act by refusing to engage in national negotiations. The UTU argued that local negotiations were necessary to take into account local considerations, such as the characteristics of the terrain, the equipment, the climate, and the service, which, it said, were controlling in determining

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1965 barred injunctive relief in the case at bar, while the C&NW argued, among other things, that the violation had long since been purged. See *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R., supra*, 385 F. 2d at 614; *Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 41 (2d Cir. 1962); *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633, 636 (4th Cir. 1969). The lower courts never reached the question, and it is not pertinent to the issue presented here.

crew size. (App. 25; J. E. Wolfe Aff. ¶ 62.) The District Court enjoined the strike and found that the union's "purpose in avoiding negotiations on a national basis" was to further its "plan . . . to isolate every railroad and call separate strikes, one at a time, in order to achieve . . . [its] ultimate objective, step by step." *Atlantic C.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 262 F. Supp. 177, 186-87 (D.D.C. 1967). The Court of Appeals reversed, holding that while national handling was obligatory in disputes which admitted of national resolution, this dispute could not be handled successfully on a national basis, because the many differences among railroads relevant to the appropriate size of crews precluded the adoption of nationally uniform crew consist rules. 383 F.2d 225 (D.C. Cir. 1967), *cert. den.,* 389 U.S. 1047 (1968).

Thus armed with the "whipsaw strike" weapon, the UTU at one time or another in the 1968-69 period struck the Missouri Pacific Railroad, the Texas & Pacific Railroad, the Atlantic Coast Line Railroad, the Belt Railway of Chicago (for 101 days), the Illinois Central Railroad, and the Louisville & Nashville Railroad (twice); and a strike against the Northern Pacific Railroad was averted by a restraining order.[7]

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[7] The strike against the Belt Railway of Chicago, as well as the first strike against the Louisville & Nashville, was halted by the appointment of Emergency Board No. 172 to investigate the disputes involving those carriers and the Illinois Central. The Board, in its Report of December 13, 1968, did not evaluate the merits of the dispute, but urged renewed negotiations. The second strike against the Louisville & Nashville, as well as the strike against the Illinois Central and the threat against the Northern Pacific, followed successively. Each of these carriers sought injunctions, alleging a breach by the UTU of Section 2 First of the Act; but in each instance the litigation was mooted by settlement prior to a preliminary injunction decision. In *Louisville & N.*

One by one most of the country's railroads capitulated to the UTU's uniform demand and surrendered the important benefits realized under Award 282. In short, the UTU demanded and obtained what it had claimed in the *Atlantic Coast Line* litigation would not be practical: the establishment upon most of the nation's railroads of a substantially uniform crew consist rule, a rule under which the norm is, once again, a minimum of two brakemen. (App. 25-28, 79-81, 101-103.)

4. *Events on the C&NW.* On the C&NW, as on other railroads, the union in initial conferences refused to engage in national handling of the parties' 1965 notices. Negotiations did not resume until the termination in 1968 of the *Atlantic Coast Line* litigation, in which the UTU's right to insist upon local negotiations was sustained. After fruitless efforts by a mediator, on October 8, 1969 the National Mediation Board proffered arbitration, as it is required to do by Section 5 of the Act when its "efforts to bring about an amicable settlement . . . [are] unsuccessful." The C&NW accepted arbitration, but the UTU declined. Accordingly on October 16, 1969 the Board, again as required by Section 5, terminated its services. During discussions held shortly before the end of the 30-day *status quo* period prescribed by Section 5, the UTU indicated it would strike unless

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R.R. v. *United Transportation Union*, Civil Action No. 5284 (M.D. Tenn. 1969), a restraining order was granted and an evidentiary hearing held on the preliminary injunction motion. In *Northern Pac. Ry.* v. *United Transportation Union*, No. 3-69 Civil 217 (D. Minn. 1969), a restraining order was issued, but no preliminary injunction hearing was held. In *Illinois Central R.R.* v. *United Transportation Union*, Civil Action No. 5378 (M.D. Tenn. 1969), a restraining order was denied, but not on jurisdictional grounds.

the C&NW agreed to its demands. The C&NW then brought this action. (App. 32-35, 44-47, 107-108, 124, 140-142.)

5. *The litigation.* The C&NW instituted suit on November 19, 1969 (App. 1). As we have noted, by this time the formal procedures of the Railway Labor Act—conferences, mediation by the National Mediation Board, proffer of arbitration, termination of mediation, and expiration of thirty days thereafter—had ended. The C&NW contended, however, that the UTU had not discharged its most important obligation under the Act respecting negotiation and mediation because it had not fulfilled the "duty" imposed by Section 2 First "to exert every reasonable effort" to settle the dispute. (App. 5-8, 60-62.)

The District Court issued a temporary restraining order (App. 57) and took evidence in support of the C&NW's motion for a preliminary injunction. Since neither the District Court nor the Court of Appeals decided whether that evidence would have established, if not rebutted, a probable violation of Section 2 First, and since the sufficiency of that evidence is not pertinent to the issue presented here, we will not pause to examine the lengthy record in detail. In brief, however, the C&NW alleged that the following acts of the UTU, singly or together, established a violation of the Act:

First, the UTU had refused *even to discuss* the C&NW's Section 6 proposal to permit a reduction of crew size in main line freight service (App. 7, 37-39, 46-47, 61, 118, 122, 137, 148). The UTU's aim was to restore positions in branch line and yard service that had been eliminated pursuant to the Award of Arbitration Board No. 282. Had the UTU been willing to

make concessions respecting the C&NW's desire to reduce main line crews, a possible basis for compromise might have emerged. But the UTU was not willing to negotiate about main line crews at all. A refusal to negotiate about any substantial element of a party's proposal constitutes a breach of the good faith bargaining obligation. See *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36, 39 (4th Cir. 1953); *United Steelworkers* v. *NLRB,* 390 F.2d 846 (D.C. Cir. 1968).

Second, when the C&NW proposed to pay additional compensation—about $1,000 a year—to brakemen if the union permitted retention of smaller crews, the UTU wrote back that it was "not willing to enter into negotiations on such a proposal" (App. 33-34, 108-109, 115, 192-194). But, the C&NW urged, the law obliges the parties at least to consider "every proffer of a new solution to a problem." *Cf. Pullman Co.* v. *Order of Ry. Conductors,* 316 F.2d 556, 563 (7th Cir. 1963). Moreover, UTU convention action forbade its negotiators to entertain this C&NW compromise proposal (App. 33-34). Such a restriction has been held to violate Section 2 First. *Piedmont Aviation Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633, 637 (4th Cir. 1969).

Third, the evidence established that the UTU maintained throughout negotiations the wholly intractable attitude that, whatever relevant considerations might be advanced by the C&NW, the C&NW would have to agree to the same terms as had other railroads (*e.g.,* App. 27, 33, 35-47, 61-62, 80-81, 111-143). Thus, as the District Court found, "[t]he evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the

United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question" (App. 204). This unyielding insistence upon a uniform national rule regardless of local considerations demonstrated "an attitude of 'take it or leave it'" (*NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 485 (1960)), and a "predetermined resolve not to budge from an initial position" (*NLRB* v. *Truitt Mfg. Co.,* 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring)), which are not consonant with good faith bargaining. This attitude, the C&NW contended, was particularly censurable because the UTU had successfully argued in the *Atlantic Coast Line* litigation that negotiation on the basis of *local* considerations was crucial to a resolution of the dispute. Thus, the C&NW urged, the UTU's strategy from the start had been to secure a judicial decision requiring local negotiation, not in order to permit genuine bargaining on the basis of local conditions, but rather to enable the UTU to employ whipsaw strikes to force upon each railroad a uniform national rule.

At the conclusion of the C&NW's evidence, the District Court granted the UTU's motion to dismiss on the ground that the National Mediation Board has exclusive jurisdiction to determine whether the parties to a dispute have complied with Section 2 First (App. 200-207). Recognizing, however, that this holding was at odds with decisions of other federal courts (Tr. 526), the District Court granted an injunction pending appeal (App. 4).

After an expedited hearing,[8] the Court of Appeals

[8] The District Court judgment was entered December 11, 1969 (App. 200, 207). After full briefing, oral argument in the Court of Appeals was had on January 7, 1970 (App. 208-209).

affirmed.[9] The Court of Appeals agreed with the C&NW that Section 2 First "was intended to play an integral part in facilitating the other more specific procedures of the Railway Act" and that "the role of the Mediation Board is basically a non-adjudicatory one." However, the court believed that "for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited 'quasi adjudicatory' posture," and concluded that "the role of determining whether 'reasonable effort' is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board" (App. 222-229).

> "[W]e interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort" (App. 227).

The court acknowledged that in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), the Court of Appeals for the Fourth Circuit had rendered "a holding opposite to our conclusions," but it said that it could ". . . not agree with the Fourth Circuit decision" (App. 228).

The court stayed its mandate—thereby leaving the interlocutory strike injunction in effect—pending proceedings in this Court.

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[9] The UTU appealed from the injunction pending appeal (App. 4), and the Court of Appeals affirmance of that order is the subject of the UTU's petition for certiorari in No. 190.

SUMMARY OF ARGUMENT

The issue presented is whether the federal courts have jurisdiction to decide a claim by a railroad that a strike threatened by a union should be enjoined because the union had failed to discharge its "duty" under Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to "exert every reasonable effort" to resolve the dispute between the parties, and thereby had failed to comply with its statutory obligations respecting conferences and mediation in "major disputes" under Sections 5 and 6 of the Act (45 U.S.C. §§ 155, 156).

If Section 2 First imposes judicially enforceable obligations, then a strike prior to compliance by the union with those obligations could be enjoined notwithstanding the Norris-LaGuardia Act (29 U.S.C. §§ 101 *et seq.*); for it is settled that Norris-LaGuardia does not bar injunctions against strikes that are illegal under the Railway Labor Act. "[T]he specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30, 41-42 (1957). See cases cited *infra* pp. 24-26. However, the Court of Appeals below held that Section 2 First is not enforceable by the courts, but only by the National Mediation Board in the exercise of an "adjudicatory or quasi adjudicatory" power. This decision is not reconcilable with prior decisions of this Court, particularly *Virginian Ry.* v. *System Federation,* 300 U.S. 515 (1937); with the settled view of Section 2 First reflected in a large body of lower court decisions; or with the language, legislative history, or policy of the Railway Labor Act.

1. The Railway Labor Act was enacted in 1926 in order to promote tranquil labor relations by the establishment, among other things, of legally enforceable obligations. The Congress was prompted to act by the ineffectiveness of the Transportation Act of 1920, under which the force of public opinion was the only sanction. *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 562 563 (1930). This general legislative purpose was reflected in a specific way by employment of the phrase "It shall be the duty" in Section 2 First. Those are words of command, not of exhortation. On the other hand, nothing in the Act suggests that the command was to be enforced by the National Mediation Board rather than by the judiciary. In defining the mediatory role of the Board, the Congress simply directed it to "use its best efforts" to bring the parties to agreement, to "endeavor . . . to induce the parties to submit their controversy to arbitration" if its efforts "shall be unsuccessful," and to "notify both parties in writing that its mediatory efforts have failed" if arbitration is refused. Section 5 First (45 U.S.C. § 155 First.)

2. The legislative history of the Act confirms what is evident from the face of the statutory language. The Act was drafted by a committee representing both railroads and unions. The principal union spokesman, Donald R. Richberg, in explaining the bill to the Congress, said that Section 2 First imposes "a legal duty"; that "it would be possible to obtain judicial power" to enforce that duty; that "the law of such enforcement or compulsion [would] be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood"; and that, in sum:

"[T]he legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." See legislative history extracts *infra* p. 36 n. 13.

As to the Mediation Board, both Mr. Richberg and Mr. A. P. Thom, the principal railroad spokesman, repeatedly stressed that, because the adjudicatory role of the Railroad Labor Board under the Transportation Act of 1920 had undermined the Board's effectiveness, the function of the new mediation Board was to be confined to conciliation. It was not to "render any decision," to "make findings," or to be a "sort of super-labor board." As Mr. Thom put it, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion . . . ." See legislative history extracts *infra* p. 39 n. 14.

3. The importance of Section 2 First in the framework of the statute requires that it be enforceable. "[T]he major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548, 565 (1930). That machinery consists of "rather elaborate . . . [provisions] for negotiation, mediation, voluntary arbitration, and conciliation." *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 148-149 (1969). Because Section 2 First is central to the effectiveness of these provisions, it is "[t]he heart of the Railway Labor Act." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377-378 (1969). While the various other provisions of the Act provide for conferences, mediation, emergency board hearings, and

"cooling off" periods, in terms these requirements are simply procedural. It is Section 2 First that infuses them with substantive content. Because of that provision, as this Court noted in *Elgin, J. & E.R.R.* v. *Burley,* 325 U.S. 711, 721-722 n. 12 (1945), the obligation to negotiate under the Act "is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it." Thus, Section 2 First must be enforceable if the statute is to fulfill its purpose.

But enforcement of this crucial statutory provision by the National Mediation Board would be inadequate. The Board's jurisdiction extends only to the mediation stage of the dispute. Thus the Board is powerless to hold the parties to their Section 2 First obligations during the conferences that precede mediation (Section 6) and during all the stages that follow mediation—the 30-day "cooling off" period after the Board's surrender of jurisdiction under Section 5, the 30 days allotted under Section 10 to emergency board hearings in important disputes, the second 30-day "cooling off" period following an emergency board report, and thereafter. And yet it is during these final stages that the necessity for good faith bargaining is most acute.

Moreover, the only "sanction" available to the Board would in many situations promote, rather than prevent, strikes. Thus, where the carrier is not bargaining in good faith on a union proposal, or a union on a carrier proposal, the Court of Appeals suggested that the Board could "release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help" (App. 225 n. 12). As this passage makes evident, this would simply

free the union for an early strike in the one situation and the carrier for an early implementation of its proposals—which would almost surely produce a strike in any important case—in the other. But the aim of the Act is that honest negotiations are to be required so that strikes may be avoided. Giving the innocent party the right to engage in economic warfare, rather than the right to secure meaningful negotiations, is hostile to that aim.

4. The decision of the Court of Appeals cannot be reconciled with the decisions of this Court.

a. *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937), is controlling. There this Court affirmed the validity of an injunction that directed a carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. The argument that Section 2 First is not justiciable was squarely made and squarely rejected. This Court concluded that the Act "requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 548.

b. All other references by this Court to Section 2 First and to *Virginian* are in accord. The many relevant opinions are cited *infra* pp. 52-54. They are typified by a passage in *Elgin, J. & E.R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), where the Court, citing Section 2 and *Virginian*, said that "one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all

parties . . . to negotiate," and that "[t]his duty is not merely perfunctory," but rather that "[g]ood faith exhaustion of the possibility of agreement is required to fulfill it."

c. In three other Railway Labor Act decisions, this Court held provisions of the Act judicially enforceable on the ground that the Congress intended to depart from the scheme of the Transportation Act and to establish enforceable obligations; that the provisions were written in mandatory terms; that their enforcement was essential to the effective operation of the statute; and that in these circumstances the absence of any specifically prescribed penalty was not controlling. *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930); *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.,* 353 U.S. 30 (1957); *International Ass'n of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963). (In one, the *Chicago R. & I.R.R.* case, the relief approved was a strike injunction.) The same principles of statutory construction are applicable here.

d. The decision cited by the lower court, *General Committee* v. *Missouri-K.-T. R.R.,* 320 U.S. 323 (1943), is not in point. There, the Court held simply that, with respect to representational disputes, all provisions of the Act must be read in light of Section 2 Ninth (45 U.S.C. § 152 Ninth), which establishes a comprehensive program for the resolution of such disputes. Since Section 2 Ninth expressly confers jurisdiction over those disputes on the National Mediation Board, and since that jurisdiction, as this Court construed the statute, was designed to be exclusive, the more general provisions, such as Sections 2 First and 2 Second, could not "make justiciable what otherwise

is not." *Id.* at 334. But that obviously does not mean that claims under Section 2 First that do *not* relate to representational disputes are not justiciable. *Virginian* held that they are; and this Court did not in *Missouri-K.-T.* suggest it was making any inroads on *Virginian*.

e. In *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944), this Court enforced against a railroad the provision of the Norris-LaGuardia Act—Section 8 (29 U.S.C. § 108)—that is written in terms identical to Section 2 First. If the "reasonable efforts" standard of Section 8 is capable of judicial enforcement against carriers, then so too is the "reasonable efforts" standard of Section 2 First capable of judicial enforcement against unions as well as carriers.

5. The lower courts, generally relying upon *Virginian*, have established a large body of case law affirming the judicial enforceability of Section 2 First both in strike injunction suits and in other contexts. As one court concisely put it, "[T]he courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the Act . . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963). The cases are discussed in full at pp. 61-70 *infra*. In addition to the Fourth Circuit decision acknowledged by the lower court in the case at bar to be in conflict with its own, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (1969), they include numerous court of appeals and district court decisions in the Second, Fifth, and District of Columbia Circuits.

6. As the decisions above indicate, a determination that Section 2 First is judicially enforceable does not require any determination respecting the authority of the National Mediation Board to enforce Section 2 First. On the other hand, since it is so clear that the Congress intended Section 2 First to impose enforceable obligations, a determination that the courts do *not* have jurisdiction over Section 2 First claims requires as a practical matter the corollary conclusion that the National Mediation Board *does* have such jurisdiction. We have already indicated how neither the language of the statute, its legislative history, nor its purposes support the lower court's view that the Board has such an "adjudicatory or quasi adjudicatory" function. Moreover, the lower court is the first to suggest to the contrary. In describing the role of the Board, the courts have uniformly taken the view that, as this Court said just last Term, "[t]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 158-159 (1969). For a discussion of the relevant cases, see *infra* pp. 71-73. Moreover, the Board itself has consistently said that its role in major disputes is confined to informal conciliation. For the relevant passages from its Annual Reports, see *infra* pp. 74-75. Indeed, just last year the former Chairman of the Board indicated specifically that the Board did not decide Section 2 First questions, see *infra* p. 76 n. 30. The Board's position was clearly reflected in an *amicus curiae* brief in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D.N.Y. 1960), where the United States not only argued that Section 2 First was justiciable but indicated that the Board was of

the view that the practice of the union under attack in that case was in fact contrary to the requirements of Section 2 First. See *infra* pp. 76-77. On the theory of this court below, in those circumstances the Board should never have terminated its jurisdiction over that dispute.

ARGUMENT

Before analyzing in detail the considerations relevant to the issue presented to this Court, we make some general observations about the character of that issue so that the Court may know at the outset what we conceive the real battleground to be. First of all, this strike injunction suit involves a construction of the Railway Labor Act, not of the Norris-LaGuardia Act. The issue is whether there is federal question jurisdiction under the Railway Labor Act, not whether injunctive jurisdiction has been withdrawn by virtue of Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). That is so because the problem of accommodating the Railway Labor Act to the Norris-LaGuardia Act, at least insofar as relevant here, has already been resolved. The C&NW's claim is that the UTU has not exhausted all the requirements of the Railway Labor Act that govern the parties in the negotiation of so-called "major disputes"—disputes over changes in collective bargaining agreements. It is clear that "[w]hile the dispute is working its way through these stages, neither party may unilaterally alter the status quo." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). See also, *e.g.*, *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 148-50 (1969). And it is also settled that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-

LaGuardia Act." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30, 41-42 (1957). See also *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 563 (1937); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 338-339 (1960); *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.*, 363 U.S. 528, 531 (1960); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 210-11 (1962). These principles have frequently been called into play by the courts with respect to strike injunctions in major disputes prior to compliance with the provisions of the Railway Labor Act. See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969); *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen*, 248 F.2d 34 (4th Cir. 1957); *Brotherhood of Locomotive Fire. & Eng.* v. *Bangor & A. R.R.*, 380 F.2d 570, 583 (D.C. Cir. 1967); *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 613 (D.C. Cir. 1967); *National Airlines, Inc.* v. *International Ass'n of Machinists*, 416 F.2d 998, 1002-03 (5th Cir. 1969); *Missouri-Illinois R.R.* v. *Order of Ry. Conductors*, 322 F.2d 793, 796 (8th Cir. 1963); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F.2d 1086, 1091-92 (2d Cir. 1970); *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527, 536-37 (D.C. Cir. 1970); *Pennsylvania R.R.* v. *Transport Workers*, 202 F. Supp. 134, 137 (E.D. Pa. 1962); *Western Air Lines* v. *Flight Eng'rs Int'l Ass'n*, 194 F. Supp. 908, 910-911 (S.D. Cal. 1961); *Pennsylvania R.R.* v. *Transport Workers*, 191 F. Supp. 915, 921 (E.D. Pa.), *aff'd*, 280 F.2d 343 (3rd Cir. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D.N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961); *American Airlines,*

Inc. v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 783-789 (S.D.N.Y. 1958).

Next, it is also worthwhile considering at the start the relationship between the view of the court below respecting the jurisdiction of the National Mediation Board to enforce Section 2 First and the issue before this Court. That issue is whether *the courts* have jurisdiction to enforce Section 2 First, not whether the National Mediation Board has such jurisdiction. The issue could be resolved *in favor* of judicial enforcement without deciding whether, and to what extent, the National Mediation Board may have a role to play in holding the parties to their Section 2 First obligations. But on the other hand, as the opinion of the lower court clearly enough reveals, a decision *against* judicial enforcement of Section 2 First virtually requires as a corollary the conclusion that the Board must settle Section 2 First issues. That is so because it is very plain that the Congress intended Section 2 First to be enforced *by someone.* Thus the lower courts did not hold—and the UTU did not argue—that Section 2 First is merely a legislative exhortation unenforceable by any organ of government. To the contrary, the Court of Appeals, noting that this Court has characterized "the duty, imposed by § 2 First" as the "heart of the Railway Labor Act," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377-378 (1969), viewed the provision as having been "intended [by Congress] to play an integral part in facilitating the other more specific procedures of the Railway Act" (App. 223).

In this brief, we will show that the Court of Appeals erred both in its holding—all relevant considera-

tions establish that, whatever may be said about the Mediation Board, the courts do have the obligation to enforce Section 2 First—and in its corollary conclusion—all relevant considerations also establish that the Board does not share that obligation. While in our view the decision of this Court in *Virginian Ry. v. System Federation,* 300 U.S. 515 (1937), is controlling, the Court of Appeals thought that decision distinguishable. Accordingly, we start our analysis at the beginning—the origins of the Railway Labor Act, its legislative history, and the significance of Section 2 First in the statutory scheme. An examination of these factors will show why this Court and all other courts except the lower courts in the case at bar have regarded Section 2 First as establishing a substantive rule of conduct subject to judicial enforcement.

I. THE LANGUAGE, LEGISLATIVE HISTORY, AND POLICY OF THE RAILWAY LABOR ACT ESTABLISH THAT THE COURTS, NOT THE NATIONAL MEDIATION BOARD, SHOULD ENFORCE SECTION 2 FIRST.

A. Antecedents of Section 2 First.

The predecessor of the Railway Labor Act of 1926 was the Transportation Act of 1920 (41 Stat. 456). That statute provided for termination of the federal control of the railroads that had been undertaken during World War I and also established procedures respecting the handling of railway labor disputes. Two features of the legislation are pertinent. First, the Act established a governmental agency, the United States Railroad Labor Board, whose role, as we shall see later, was examined by the Congress in connection with defining the functions of what is now the National Mediation Board. And second, the Transportation Act contained in Section 301 (41 Stat. 469) the forerunner

of Sections 2 First and 2 Second of the Railway Labor Act.

Both of these aspects of the legislation—the role of the Railroad Labor Board and the significance of Section 301—were examined by this Court in two cases involving a continuing struggle between a union and the Pennsylvania Railroad Company. At heart, that struggle was one for recognition of the union. In the first case, this Court held that the Railroad Labor Board had authority to prescribe rules for the selection of the employees' representatives that would be entitled to invoke the services of the Board. *Pennsylvania R.R.* v. *United States R.R. Labor Bd.*, 261 U.S. 72 (1923). The Court noted that the Board was a body empowered by the Congress to investigate railway labor disputes, to make "decisions" respecting them, and to "direct . . . public criticism against the party who, it thinks, justly deserves it." *Id.* at 79-80. In the performance of that statutory function, the Court held, the Board had the right to promulgate rules respecting the procedures that ought to be followed by the parties in determining who should speak for the employees.

Thereafter, however, the railroad ignored the rulings of the Board and entered into a contract with the union it preferred. The aggrieved union again brought suit, asserting that the company had breached the Act. Among other provisions of the Act, it cited Section 301, which provided in part:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate of-

ficials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. . . ." 49 Stat. 469.

This time, however, the union lost on the ground that, while the Board had the authority to decide that the railroad was not complying with the standards expressed in the Act, no one had the authority to compel the railroad to change its ways. *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925). Under the statute, this Court held, the "sanction . . . of publication and public opinion, exists . . . and nothing else." *Id.* at 217. As to Section 301, language that might otherwise be thought to fasten upon the company a legally binding obligation to deal with duly designated employees' representatives fell under the weight of the legislative intent that infused the entire statutory scheme:

> ". . . The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation or some other means of compulsion, and there were not the other provisions of the Title to help its construction, be given the force of a statutory obligation. . . . But when the other sections of the Title are taken as a whole, they may be searched in vain to find any indication in the mind of Congress or any intimation that the disputants . . . were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Id.* at 216.

This, then, was the state of railway labor law when the 69th Congress considered the bill that became the

Railway Labor Act: an administrative board had bee constituted with the responsibility of "deciding" ho employees should choose their representatives and ho the companies and the employees should resolve thei disputes, but neither that board nor the courts ha been empowered to require anyone to do anything.

B. The Railway Labor Act of 1926—Its Terms.

In 1926 the Congress repealed the Transportatio Act of 1920 and enacted in its stead the Railwa Labor Act. 44 Stat. 577. The Congress acted "wit clear appreciation of the infirmity of the existing leg islation, and in the endeavor to establish a more pra ticable plan in order to accomplish the desired r sult. . . ." *Texas & N.O. R.R.* v. *Brotherhood Ry. Clerks,* 281 U.S. 548, 562-563 (1930). The legi lation created a wholly new scheme for dealing wit disputes in the railroad industry. In general, th Act contained provisions designed to secure the rig of employees to designate their bargaining represent tives and to require good faith bargaining on the pa both of those representatives and of the employe (Section 2); it provided for arbitration of "mino disputes" by boards of adjustment (Section 3); established, in place of the Railroad Labor Boar the Board of Mediation and defined its functions wit particularity (Sections 4 and 5); it prescribed th procedure to be employed by the parties in seekin changes in collective bargaining agreements (Sectio 6, 2 Second, 2 Fifth); it provided for voluntary arb tration of "major disputes" (Section 7); it authorize the President to appoint emergency boards to invest gate disputes that threatened to interfere with esse tial transportation service (Section 10); and it r quired the maintenance of the *status quo* while th

several requirements of the Act were being fulfilled (Sections 6 and 10).

The provisions with which we are here concerned—Section 2 First, Section 5, and Section 6—appeared in the 1926 legislation in terms that are substantially identical to today's statutory language. 44 Stat. 577-578, 580, 582.[10] Without regard to the legislative history of the statute, which we discuss in the next part of this brief, the statutory language is the strongest sort of evidence that Section 2 First was designed to impose enforceable obligations, but it affords no support whatever for the view that the National Mediation Board was to be the enforcer.

Consider the language of Section 2 First. By that section, the Congress declared that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ." Surely it is not lightly to be assumed that when the Congress says it is imposing a "duty" it means a moral rather than a legal obligation. The Congress ought to be taken at its word; and the phrase "shall be the duty" signals about as straightforward an invocation of the legislative authority to create enforceable rights and obligations as one can imagine.

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[10] In 1934 the Act was amended (48 Stat. 1185) to provide for compulsory arbitration of minor disputes (§ 3), resolution by the Mediation Board of representational disputes (§ 2 Ninth), increased freedom of employees to organize (§ 2 Fourth), maintenance of the *status quo* for 30 days after mediation in major disputes (§ 5), changing the name of the Board of Mediation to the National Mediation Board (§ 4), and reducing the number of board members from 5 to 3 (§ 4), all provisions which are not directly relevant to the issue here presented.

Next, consider the provisions relating to the National Mediation Board. There is nothing to suggest that the Board is to have any adjudicatory responsibility with respect to major disputes.[11] In the original Act, as now, there is only one paragraph that defines the mediatory function of the Board. That paragraph, which appears in Section 5 First, reads as follows:

> "... [T]he said board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable adjustment through mediation shall be unsuccessful, the said board shall at once endeavor as its final required action (except as provided in paragraph third of this section [respecting arbitration procedures] and in section 10 of this Act [respecting emergency boards]), to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act."

There is nothing in this language, or in any other provision of the Act, that affords any textual support for the conclusion of the Court of Appeals that the

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[11] The 1934 amendments, as we have noted (*supra* p. 31 n. 10), authorized the Board to decide representational disputes. See Section 2 Ninth (45 U.S.C. § 152 Ninth). While this is an exception to the general rule of the statute that the Board's role be non-adjudicatory, Section 2 Ninth also proves what should be presumed—that the Congress knows how to draft a provision conferring decisional authority upon an agency when it intends that the agency be clothed with that sort of power. Nor does the legislative history of the 1934 amendments reflect any purpose to alter the nonadjudicatory role of the Board respecting major disputes. See *S. Rep. No. 1065*, 73rd Cong., 2d Sess. (1934), p. 3 (the Board's "powers are wholly persuasive"); *H. Rep. No. 1944*, 73rd Cong., 2d Sess. (1934), p. 2 (the bill "does not change the methods [respecting] . . . major disputes").

Congress intended to give to the Mediation Board the authority to enforce the "duty" imposed by Section 2 First—much less that it also intended to withhold such authority from the courts. Section 5 directs the Board to exercise *its* "best efforts" to bring about a settlement, but does not speak in terms of the Board's compelling the parties to exercise *their* best efforts or deciding whether or not they have. And the Board is to terminate its services when it is satisfied that its efforts have been "unsuccessful," not when it determines that the parties' efforts have, or have not, complied with the Act.

As we read the Court of Appeals opinion, it does not rely upon statutory language, but rather upon what the Court regarded as important extrinsic considerations that revealed the purpose of Congress. We discuss those considerations later. But it is one thing to look beyond the terms of the statute for evidence of legislative intent and another to sweep those terms aside altogether. The fact is that the primary tool of legislative construction, the statute itself, weighs most heavily against the holding of the court below.

C. The Railway Labor Act of 1926—Its Legislative History.

What seems clear on the face of the statute is confirmed by the legislative history of the 1926 Act—the Congress did intend that Section 2 First be enforced by the courts, and it did not want the Mediation Board to undertake any such adjudicatory responsibility.

We need not discuss all the materials bearing on the general purpose of the Congress to depart from the basic scheme of the Transportation Act of 1920 under which public opinion afforded the sole sanction

for transgressions, since this Court has carefully examined those materials in other cases. The most notable occasion, perhaps, was *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930). The question there was whether Section 2 Third of the Act, which provided for the selection of employee representatives "without interference, influence, or coercion," "imposed a legal duty upon the Railroad Company, that is, an obligation enforceable by judicial proceedings." *Id.* at 560. In holding that the Act did impose such an obligation, this Court canvassed the legislative history of the statute, observed that the Congress regarded the 1920 Act as beset by "infirmity," and concluded:

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite legal obligations enforceable by judicial proceedings." *Id.* at 567.

This shift from a statutory scheme marked by exclusive reliance upon public opinion to one marked in substantial measure by reliance upon judicially enforceable obligations is, of course, relevant here. As we have noted (*supra* p. 29), the dominant policy of the Transportation Act was enough for the Court in the second *Pennsylvania* case to hold non-enforceable language in Section 301, the forerunner of Section 2 First, that the Court said might otherwise have been held enforceable. But the abandonment by the Congress of that policy led the Court in *Texas & N.O.,* applying normal canons of statutory construction, to hold Section 2 Third enforceable. And surely Section

2 Third is framed in no more mandatory terms than Section 2 First.

But beyond that, while there evidently was no legislative history specifically addressed to the enforceability of Section 2 Third, there is compelling legislative history directed to the judicial enforceability of Section 2 First.

As this Court noted in *Texas & N.O.* (*id.* at 563-564), the Railway Labor Act was drafted by a committee representing most of the railroads and railroad unions and was supported by both management and labor. "It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." *Railway Employes' Dep't* v. *Hanson,* 351 U.S. 225, 240 (1956) (concurring opinion), quoted in *International Ass'n of Machinists* v. *Street,* 367 U.S. 740, 758 (1961).

Donald R. Richberg, who was the principal spokesman for labor, discussed at some length the question whether parties could be held to account by the courts for violations of Section 2 First.[12] What he said came to this: First, Section 2 First imposes "a legal duty upon" the parties "to make every reasonable effort to make and maintain agreements," and "it would be possible to obtain judicial power to enforce" that obligation. Second, the drafters of the legislation had deliberately refrained from "writ[ing] into the law a specific line of penalties and writs of enforcement" be-

[12] This Court has regarded Mr. Richberg's testimony as authoritative. See *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 152 n. 19, 153 n. 20 (1969); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740, 758-59 (1961).

cause of their belief that it was preferable "for the law of such enforcement or compulsion [to] be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood." Third, if there were to be any restrictions upon enforcement of Section 2 First, those restrictions would have to arise from some inherent limitation upon the judicial power, since the Act contemplated judicial enforcement on a case-by-case basis in the same fashion that a court would enforce any other legal obligation similar to that imposed by Section 2 First. Mr. Richberg summarized his position as follows: ". . . [T]he legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." [13]

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[13] In fuller text, Mr. Richberg's comments summarized above were as follows:

"Mr. Fredericks [a member of the House Committee]: Now does this law up to the time where the mediation board is provided for require the doing of anything which you could not do without it?

"Mr. Richberg. Require otherwise?

"Mr. Fredericks. Yes.

"Mr. Richberg. I think it does; in other words, *it requires both parties to make every reasonable effort to make and maintain agreements. It makes that a legal duty upon them.*

"Mr. Fredericks. How is that enforced?

"Mr. Richberg. Well, that is a different question.

"Mr. Fredericks. I know it is. I am asking you a different question.

"Mr. Richberg. Well, when you say to require—I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. *The thought being this, that so far as this*

Nor did it ever occur either to Mr. Richberg or to Mr. A. P. Thom, the principal railroad spokesman, that this "legal obligation" of Section 2 First, as Mr. Richberg characterized it, would be enforced in any respect by the Mediation Board. Quite to the contrary.

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law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

"Now there are certain limitations upon what I have said, because how far the court, for example, can compel the parties to exert every reasonable effort, what that means, may be a question. But when the transportation act was under consideration by the Supreme Court the Supreme Court said that very clearly there was no purpose by Congress in passing that act to have the labor board's orders enforced by judicial order.

"What we have sought here is not to enforce the orders of any Governmental tribunal, but to provide a basis upon which it may be possible to enforce legal obligations written by Congress. Now that would present a different question in a judicial proceeding. For example, *it may well be that an effort on the part of any group of men of either party, representing either employer or employees, to set up barriers to the free operation of this law, would be in violation of the law, and it would be possible to obtain judicial power to enforce that.*" "Railroad Labor Disputes." *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), p. 40. (Emphasis supplied.)

Later in the hearings, Mr. Richberg reconfirmed his view in a colloquy with Congressman Garber:

"Mr. Richberg. In the first place, it is their duty to exert every reasonable effort—taking page 3—to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. *In other words, the legal obligation is imposed, and as I have previously*

Just as the drafters of the legislation regarded the experience under the Transportation Act of 1920 as calling for the enactment of judicially enforceable duties, so too did they regard the unhappy experience of the Railroad Labor Board as arguing for a mediatory body that would not be called upon to express its own view as to controversies between the parties. We set

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stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion.

• • • •

"We believe, and this law has been written on the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in *writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America. . . .*" *Id.* at 91. (Emphasis supplied.)

See also *id.* at pp. 84, 85.

Similarly, in the House debates Mr. Nelson said that Section 2 First "puts upon the railroads and the employees the legal obligation to exert themselves in every reasonable way to arrive at an agreement"; and Mr. Mapes said that the bill "declares the legal as well as the moral obligation of the parties to use every effort to settle all their disputes themselves in conference." 67 *Cong. Rec.* 4517, 4522 (1926). And, in a longer discussion, Mr. Newton said that the bill imposed "certain duties," including the obligation "[t]o make reasonable effort to settle disputes," which were not "merely directory" because:

". . . [T]he word 'shall' is used. Certain duties, both general and specific, are laid upon the parties . . . The violation by either party of these duties would call for appropriate action in the courts of law and equity by the aggrieved party or the public.

"Mr. Sproul of Kansas. In what way? Where is there any such provision?

"Mr. Newton of Minnesota. Through the theory of the common law. The duties are laid down. The law for enforcement would be developed in the courts after the obligations are made and understood." *Id.* at 4584.

forth in the margin the many statements by Messrs. Richberg and Thom that establish that, so far as the architects of the bill were concerned, the role of the Board in the mediation prescribed by the Act would be restricted to informal and confidential conciliation, and that this role would be undercut if the Board were to "make public reports . . . condemning one party or the other," or if it were to "render any decision" or "to make findings" or to be a "sort of super-labor board." As Mr. Thom summarized the matter, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ." [14] While the witnesses were directing their attention in the main to the way in which the confidence of the par-

[14] Messers. Richberg and Thom testified as follows in the House Hearings (see n. 13 *supra*) and in "Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 2306*, 69th Cong., 1st Sess. (1926):

". . . The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the Labor Board. . . . The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders. . . ." *House Hearings* at 18 (Richberg).

"Well, in all respects that I can see, they [mediation proceedings] should be regarded as private hearings. They are not private in this sense, that of course if mediation is called for in a situation that is of public interest, the public will know that the mediators are operating in the situation, but there will not be public hearings in the sense that the mediators will not sit behind the table and call witnesses and have the general public present to hear the presentation. In other words, they are trying to settle a controversy, not to make it worse." *House Hearings* at 89 (Richberg).

". . . The board of mediation attempts to bring them [the parties] to an agreement, first, as to the dispute itself, and if that fails, then an agreement to arbitrate. But the board of

ties in the impartiality of the Railroad Labor Board had been eroded by the Board's taking positions on the merits of the disputes, it is scarcely arguable that the same danger of impairment of the conciliation function

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mediation does not render any decision." *House Hearings* at 131 (Thom).

"The board of mediation has no right to make findings: they have only the function of conciliation and persuasion. . . ." *House Hearings* at 136 (Thom).

". . . It is to be assumed, I assume, that the board of mediation will act as the old board of mediation used to act, by interviewing the parties, by attempting through conciliatory methods and persuasion to induce them to agree, and failing that effort, to bring about arbitration. But that board is not intended to make any statement to the public, if that is what you mean." *Senate Hearings* at 11 (Thom).

"Now the board of mediation is intended to continue to be regarded by both parties as an impartial body whose services will be valuable, and bring them together. . . . So the power was scrupulously withheld from this mediation board to do anything but try to bring the parties together. They must continue with their powers of conciliation unimpaired, and they could not do that if they are to render judgment. So that there never was a purpose to make the board of conciliation a fact-finding commission or to have a report on the merits." *Senate Hearings* at 13 (Thom).

". . . Now you are going to destroy that [mediation] function if you set that board up in this law in such a manner that you appear to be creating another Labor Board, a sort of super-labor board that will come in and solemnly sit behind a table and summon witnesses and take evidence and consider the matter in private conference, and then issue an unenforceable opinion. Now that is not going to help the situation very much, as has been demonstrated by the Labor Board. When you require men to testify in public you know the care with which they must weigh their words, you know how difficult it is quickly to arrive at all the underlying factors in the controversy. But when men are brought into private conference, when a dispute is investigated informally and the men on both sides can be talked to freely and frankly, that is the reason why Government mediation has been successful in the past, and that is the reason why Government mediation should be successful under this bill and never call for the

would not arise from agency determinations that one or another of the parties had not bargained in good faith.

This legislative history respecting the enforceability of Section 2 First and the role of the Mediation Board is clear and persuasive.[15] Together with the statutory

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creation of an emergency board." *Senate Hearings* at 83-84 (Richberg).

"... This mediation board does not decide anything except in a single case. It is only intended to exert its good offices to bring the parties together .... The mediation board does not [decide anything], except in the single case mentioned [in what is now 45 U.S.C. § 155 Second], where they give an interpretation of an existing agreement after hearing. ..." *Senate Hearings* at 157 (Thom).

For similar remarks in the debates, see 67 *Cong. Rec.* 4517, 4573, 4657, 4703, 4779, 8894, 9200 (1926).

[15] Note may also be taken of Mr. Richberg's testimony respecting the Howell-Barkley bill, drafted and sponsored by the unions and considered in 1924 by the 68th Congress. See "Arbitration between Carriers and Employees," *Hearings before the Senate Committee on Interstate Commerce on S. 2646,* 68th Cong., 1st Sess. (1924), p. 15. That bill contained many of the provisions that were to appear in the Railway Labor Act, including Sections 2 First and 5 First. 65 *Cong. Rec.* 7881-82 (1924). As to Section 2 First, Mr. Richberg testified that the duty "to exert every reasonable effort to make and maintain agreements" would be "the foundation principle of the railway labor act," and that that provision would establish "mutual obligations of employer and employee *which are to be enforced by law*" (emphasis added). He added that the "legal propriety of imposing this duty upon" the parties "can hardly be questioned in view of the decisions of the Supreme Court sustaining regulations of industrial relations in many cases ...." As for the mediation board, he explained that the new provisions would eliminate "the difficulty" of the old Labor Board, and he paraphrased a statement by Secretary of Commerce Hoover that "there is a fundamental inconsistency in attempting to combine the functions of a mediator and an arbitrator in the same board." *Senate Hearings,* pp. 17-18, 24. Moreover, the sponsor of the bill, Congressman Barkley, explained on the floor of the House that the "Board of Mediation is not a deciding body" and that "it cannot decide anything." 65 *Cong. Rec.* 7780 (1924).

language itself, it stands squarely in the way of t
holding of the court below.

**D. The Railway Labor Act of 1926—The Role of Section 2 Fi
in the Statutory Scheme.**

Another relevant consideration in a case of this so
as this Court said in *Texas & N.O.* (281 U.S.
568), may be "the importance of the prohibition in
relation to the plan devised by the Act." In view
the clarity of both the terms and the legislative histo
of Section 2 First, only the clearest demonstration th
judicial enforcement would badly cripple the "pl
devised by the Act" could even arguably support t
conclusion that enforcement by the courts should
denied. But the fact is, as we now show, that it is t
rule of the decision below, not judicial enforceme
that would undermine the policy of the Act.

As this Court noted in *Texas & N.O.,* (281 U.S.
565), "the major purpose of Congress in passing t
Railway Labor Act was 'to provide a machinery to p
vent strikes.'" That machinery consists of "rath
elaborate . . . [provisions] for negotiation, mediati
voluntary arbitration, and conciliation." *Detroit
T.S.L. R.R.* v. *United Transportation Union,* 396 U.
142, 148-149 (1969). "[T]he procedures of the Act a
purposely long and drawn out, based on the hope th
reason and practical considerations will provide
time an agreement that resolves the dispute." *Broth
hood of Ry. Clerks* v. *Florida E.C. R.R.,* 384 U.S. 2
246 (1966).

Among these various provisions designed to avo
strikes by the encouragement of reasoned bargainin
Section 2 First, as this Court has declared, is central

> "The heart of the Railway Labor Act is the du
> imposed by § 2 First upon management and labo

'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969) (elipses by the Court).

It is evident why that is so. Section 6 of the Act requires the parties to hold conferences, but it doesn't in terms impose anything but a purely procedural obligation. So, too, with respect to Section 5, which authorizes either of the parties to invoke mediation and the National Mediation Board to proffer its services if there is no invocation. So, too, with respect to Section 10, which authorizes the establishment of emergency boards. So, too, with respect to the obligations of the parties during the "cooling off" periods prescribed by Sections 6, 5, and 10 during conferences and mediation as well as after the Mediation Board and the Emergency Board have completed their work.

It is only Section 2 First that plainly states the legislative intent that, during the exhaustion of the various procedural steps required by the Act, the parties may not refuse to engage in meaningful negotiations. Accordingly, if the obligation of Section 2 First is not discharged during the course of the negotiations and mediation required by the Act, in the most fundamental sense there has not been the sort of negotiation or mediation contemplated by the Congress. Rather, there has just been the marking of time until, by the calendar, the union is free to strike or the railroad either to lock out or put its proposals into effect. As this Court said in one of its landmark decisions interpreting the Act, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S.

711, 721-22 n.12 (1945), the "duty upon all parties t a dispute to negotiate for its settlement" "is not merel perfunctory." "Good faith exhaustion of the possi bility of agreement is required to fulfill it." And a a lower court said in connection with its order restrain ing a strike on grounds of alleged Section 2 First vio lations, "[t]o effectuate the purpose of the Act and t prevent a mockery of its requirements such efforts [t resolve the dispute] must be reasonable and made i good faith and not simply to satisfy perfunctory com pliance." *Long Island R.R.* v. *Brotherhood of R.R Trainmen,* 185 F. Supp. 356, 358 (E.D. N.Y. 1960) Or as that court said again in similar circumstance "[i]f compliance with the Act need only be perfunctor the congressional mandate would be defeated and th purposes of the Act rendered nugatory." *Pan Ameri can World Airways, Inc.* v. *Brotherhood of Ry. Clerks* 185 F. Supp. 350, 353 (E.D. N.Y. 1960).

These, then, are the basic policy considerations tha confirm what is evident from the language and histor of the statute—the Congress intended that Section First be enforced because the obligation it imposes i as the lower court in the case at bar acknowledged, "a integral part in facilitating the other more specifi procedures of the Railway [Labor] Act" (App. 233).

As to the question in this case—whether the enforc ing agency should be the National Mediation Board t the exclusion of the courts—one crucial factor in addi tion to those we have discussed in previous portions o this brief stands out. The jurisdiction of the Mediatio Board extends to only one of the several procedura stages required by the Act, while the obligation of Sec tion 2 First applies throughout a dispute. Thus, th Board cannot compel good faith bargaining during th

conferences prescribed by Section 6, and yet it was the purpose of the Congress that, whenever possible, disputes be settled at that stage without intervention by third parties.[16] If a judicial remedy is not available, the "duty" of the parties to exert every reasonable effort to settle during conferences will simply be read out of the Act. Even more significantly, once the Mediation Board surrenders its jurisdiction under Section 5 of the Act, it no longer has the power to require the parties to maintain the *status quo,* and accordingly it no longer has any power to induce compliance with Section 2 First. That is so during the 30-day "cooling off" period that under Section 5 follows the termination of mediation; during the 30 days allotted to emergency board hearings by Section 10 in those disputes that "threaten . . . to deprive any section of the country of essential transportation service"; during the second 30-day "cooling off" period required by that Section after an emergency board report; and of course thereafter as well. And yet, in the most important and intractable disputes, in those that most seriously jeopardize the interest of the public in averting a shut-

[16] Thus, Section 2 Second (45 U.S.C. § 152 Second) provides:

"All disputes . . . shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

And see, *e.g.,* the statement of Congressman Mapes, one of the spokesmen for the House bill, in the floor debate:

"In other words, the bill recognizes and declares the legal as well as the moral obligation of the parties to use every effort to settle all their disputes themselves in conference, amicably and without calling in any outside help. That is the spirit in which the entire bill is written. That thought can not be overemphasized." 67 *Cong. Rec.* 4522 (1926).

down of rail service, it is precisely during these terminal periods that the necessity of compliance with Section 2 First is most pressing.

But not only would delegation of the power to enforce Section 2 First to the Mediation Board rather than to the courts fail to secure the goal of the legislation. It would also in many instances defeat that goal in a way different from, and in addition to, the compromising of the Board's mediatory effectiveness that we have already discussed in connection with the legislative history of the Act. This additional subversion of the legislative policy would occur because the only remedy available to the Board would be to take action that often would promote, rather than prevent, strikes.

The Court of Appeals suggested that the Mediation Board could deal with violations of Section 2 First this way:

> "The Board [under Section 5] can refuse to certify that 'its mediatory efforts have failed' and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. . . .
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> . . . . . .
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> "Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help." (App. 225 & n. 12.)

The inadequacy of these "remedies" in terms of the aim of the statute—the prevention of strikes through good faith bargaining—is apparent. It is well and

good to suggest that, where the union is both the proponent of a change in the existing agreements and is also the party not bargaining in good faith, the Board could promote bargaining and prevent a strike simply by refusing to release its jurisdiction over the dispute. But those plainly would not be the results, as the second paragraph of the Court of Appeals opinion quoted above discloses, where the party that does not bargain in good faith is the resisting party rather than the moving party. Thus, where the union proposes and the carrier refuses to dispose, the notion is that the union should be freed to strike rather than that the carrier should be compelled by injunction to bargain; and where the carrier proposes and the union refuses to dispose, the notion is that the carrier should be authorized to put into effect its proposals or lock out, action that in any important dispute is virtually certain to provoke a retaliatory strike. The purpose of the Act is to insure honest negotiations, not economic warfare. Giving a party the "remedy" of engaging in such warfare is hostile to, not supportive of, the fundamental statutory scheme.

II. DECISIONS BY THIS COURT, AS WELL AS BY THE LOWER FEDERAL COURTS, ESTABLISH THAT SECTION 2 FIRST IS JUDICIALLY ENFORCEABLE.

We turn now to the case law that bears on the question of the judicial enforceability of Section 2 First. That authority is decisively against the holding of the Court of Appeals in the case at bar. Most of the cases we will discuss deal directly with the Railway Labor Act. In addition, however, we take note of this Court's enforcement of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108), which is written in precisely the same terms as Section 2 First.

A. Decisions of This Court.

1. *The Virginian Ry. case.* The line of Section 2 First cases begins with the decision that, as we have indicated, we regard as controlling, *Virginian Ry.* v. *System Federation,* 300 U.S. 515 (1937). That decision, which is surely one of the most important of this Court's Railway Labor Act decisions, has been heavily relied upon by the lower courts, as we will show.

In *Virginian,* the plaintiff union, which had won a representation election conducted under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth), sought judicial intercession when the carrier continued to deal with a "company union." The union grounded its claim upon several provisions of the Railway Labor Act, including Section 2 Ninth and Section 2 First. The District Court held for the union, entering an injunction that directed the carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. *Id.* at 540.

In this Court, the carrier attacked both parts of the injunction on the theory that the statutory provisions upon which they were based were intended by the Congress to be merely precatory. The principal authority advanced in support of this argument was *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.,* 267 U.S. 203 (1925). 300 U.S. at 544. There, as we have noted (*supra* p. 29), this Court held that the forerunner of Section 2 First—Section 301 of the Transportation Act of 1920—was "without legal sanction in that Act." Beyond that, the carrier urged that the subject matter of the injunction, which involved

evaluation of the carrier's good faith, was not suitable for judicial inquiry. *Id.* at 549.

In countering these arguments, the union had the support of the United States, which appeared as *amicus curiae.* The Solicitor General, advancing considerations we urge in the case at bar, argued:

> "A review of the history and context of these sections . . . shows that Congress intended the obligations imposed by paragraphs First, Second, and Ninth of § 2, to be both mandatory and enforceable.
>
> "Enforcement of paragraphs First, Second, and Ninth of § 2 is in fact essential to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. . . ." 300 U.S. at 536.

This Court agreed. This is how the Court summarized the carrier's principal argument against the enforceability of the Act's commands:

> "But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to 'treat with' respondent Federation 'and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.'" 300 U.S. at 544.

And this is how the Court rejected that argument:

> "The policy of the Transportation Act [of 1920] of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was . . . abandoned by the enactment of the Rail-

way Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case [*Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930)] . . . lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.

. . . . . .

"The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 545, 548 (footnote omitted).

As to the carrier's secondary argument respecting the propriety of judicial relief, the Court summarized the carrier's position in this way:

"Petitioner contends that . . . negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." *Id.* at 549-550.

And this is how the Court disposed of that contention:

"Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." *Id.* at 550.

In the case at bar, the Court of Appeals thought that *Virginian* meant only that the parties in negotiating "should be guided by" Section 2 First, not that a refusal to comply with that provision could be remedied by judicial decree. That is so, the court below said, because this Court in *Virginian* "did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer" (App. 228).

In this the Court of Appeals erred. This Court in *Virginian* not merely "implied," but explicitly "stated," that compliance by the carrier with its Section 2 First obligation was "a question for the courts to answer." It so "stated" when it wrote that the Act "required the employer . . . to make reasonable effort to compose differences" and "to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First," and when it wrote that "whether action taken or omitted is in good faith or reasonable . . . [is an] everyday subject . . . of inquiry by courts in framing and enforcing their decrees." And just as surely this Court "implied" the same thing when it rejected the argument that Section 2 First "affords no legal sanction" for so much of the injunction as required the carrier to "exert every reasonable effort" to settle its disputes with the union.

Under the Court of Appeals approach to Section 2 First, the only avenue open to the union in *Virginian* would have been to serve Section 6 notices, to invoke the services of the Mediation Board, and then to secure release of the case by the Board so as to permit a strike against the railroad. The endorsement of this course as the only "remedy" available under the Act would have required the adoption of a view of the

whole statutory scheme, as well as of Section 2 First, directly at odds with *Virginian*.

2. *Opinions subsequent to Virginian.* Even if *Virginian* were in any way ambiguous with respect to the Section 2 First question, that ambiguity would be erased by this Court's description of *Virginian* in another of its leading Railway Labor Act opinions, *Elgin, J.&E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946). There, citing *Virginian* as authority for the proposition that Section 2 First is "judicially enforceable" and that it requires "[g]ood faith exhaustion of the possibility of agreement," this Court stated:

> "Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26 [quoting Section 2 First and other of the subsections of Section 2]; *Virginian R. Co.* v. *System Federation*, 300 U.S. 515; cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 320; *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. Cf. *Virginian R. Co.* v. *System Federation, supra*, at 548, 550; *Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50, 56 ff. . . ." [17]

All other references in this Court's opinions to *Virginian* and Section 2 First—and they are many—are in accord with *Burley*. Two terms ago, as we have al-

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[17] And again, on rehearing, the Court in *Burley* said: "We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute." 327 U.S. at 665 (footnote omitted).

ready noted (*supra* pp. 26, 42), this Court called Section 2 First the "heart of the Railway Labor Act." *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969). And just last Term, citing that opinion as well as *Burley* and *Texas & N.O.*, this Court declared that the Act "imposed upon the parties *an obligation to make every reasonable effort to negotiate a settlement* and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted," and also that Sections 5, 6, and 10 "must be read in conjunction with the implicit status quo requirement in *the obligation imposed upon both parties by § 2 First, 'to exert every reasonable effort' to settle disputes* without interruption to interstate commerce." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 149, 151 (1969) (emphasis supplied; footnotes omitted).

To move back in time, in *Brotherhood of Ry. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658 (1965), this Court reaffirmed *Virginian's* declaration that the Act requires "a negotiation for the settlement of labor disputes such as is contemplated by § 2, First"; in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960), this Court referred to the "Act's command that employees as well as railroads exert every reasonable effort to settle all disputes"; in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961), this Court stated that Section 2 First "created affirmative legal duties on the part of the carriers and their employees"; and in *Stark* v. *Wickard*, 321 U.S. 288, 303 (1944), this Court cited *Virginian* as dealing with "a right created by statute [which] is mandatory in character and obviously capable of judicial enforcement."

See also *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300-301 (1943); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-14 (1944).[18]

3. *Other relevant Railway Labor Act decisions.* Three decisions of this Court dealing with provisions of the Act other than Section 2 First are also relevant. In each, this Court held the provision in question judicially enforceable upon reasoning pertinent to the issue at bar. The first is the 1930 decision in *Texas & N.O.*, 281 U.S. 548, which we have already mentioned. There, this Court held Section 2 Third enforceable by injunction. After reviewing the importance of the provision

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[18] For commentators' views of *Virginian* and Section 2 First, see Meltzer, "The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining," 1960 *Supreme Court Review* 113, 125-126 & note 54 (In *Virginian* "the Court sanctioned the use of an injunction against an unwilling employer to enforce the duty to bargain." The "Court's statement that the Act requires the employer to make 'reasonable effort to compose differences' " is not *dictum*, because "the injunction sustained in *Virginian Railway* required the employer not merely to recognize the union but also to 'exert every reasonable effort to make and maintain agreements.' "); Note, 59 *Mich. L. Rev.* 459, 463 n. 27 (1961) (Section 2 First "is enforceable by order of a federal court," citing *Virginian*); Cox, "The Duty to Bargain in Good Faith," 71 *Harv. L. Rev.* 1401, 1404 (1958) (Section 2 First "is enforceable by a private suit for an injunction," citing *Virginian*); Harper, "Major Disputes Under the Railway Labor Act," 35 *J. Air. Law & Com.* 3, 35 (1969) (The Section 2 First duty "is judicially enforceable"; "failure to bargain in good faith is failure to comply with the Act and is enjoinable."); Highsaw, "The Need for Re-evaluation of Labor Legislation," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 450, 455 (1969) (Section 2 First "creates an enforceable obligation in the federal courts . . . . It is in essence a requirement of 'good faith' bargaining by the parties."). See also Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 *Mich. L. Rev.* 1065, 1099-1100 (1941).

in the statutory scheme, the Court concluded that the Congress could not have "intended it to be ignored."

> "As the prohibition [of Section 2 Third] was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Id.* at 569.

Nor did the absence of a statutorily prescribed penalty detract from this conclusion. Observing that "a legal obligation is created" by other sections of the Act respecting obedience to arbitration awards and maintenance of the *status quo,* even though no penalties were specified in the statute, the Court cited *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 162, 163, (1803), for the principle that "[t]he right is created and the remedy exists." *Id.* at 569-70.

In *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.,* 353 U.S. 30 (1957), this Court held enforceable the requirement of Section 3 respecting arbitration of minor disputes. Moreover, the enforcement approved was by the same means the C&NW sought in the case at bar, that is, by an injunction against a strike on the ground that the statutory command had not been obeyed. While Section 3 contained no provision for enforcement, this Court sanctioned "the use of injunctive relief to vindicate the processes of the Railway Labor Act," citing *Virginian. Id.* at 41. The Court said in a later case, *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 339 (1960), that the strike injunction was warranted in *Chicago River* "to prevent a plain violation of a basic command of the Railway Labor Act . . . ." And in *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.,* 363 U.S. 528, 531 (1960), the Court further explained the hold-

ing in *Chicago River* by saying that the legislative purpose of Section 3 "might be frustrated if strikes could not be enjoined during the" statutory procedures.

Finally, in *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court found judicially enforceable Section 204 of the Act (45 U.S.C. § 184) imposing a duty upon parties to airline disputes to establish boards for compulsory arbitration of minor disputes. Section 204 contains no enforcement provision, but it is drawn in the same mandatory language as Section 2 First:

> "*It shall be the duty* of every carrier and of its employees. . . to establish a board of adjustment of jurisdiction [comparable to those authorized by] section 153 of this title." (Emphasis added.)

The Court concluded that Congress "intended [this] statutory command to be legally enforceable in the courts" in order to make the "system for the settlement of grievances" "reliable and effective," and to avoid the "confusion and chaos" which might result from leaving "the establishment of the Boards to the whim of the parties." 372 U.S. at 690.

In each of these cases, then, the Court held judicially enforceable provisions of the Railway Labor Act that, like Section 2 First, had been drafted by Congress in mandatory terms and were important enough to require judicial enforcement for the effective working of the statute. There is no basis for a different approach to the issue at bar. The Congress surely did not intend compliance with Section 2 First—the "heart" of the Act—to be left "to the whim of the parties." 372 U.S. at 690.

4. *The Missouri-K.-T. case.* While the Court of Appeals thought distinguishable the decision that is plainly in point, *Virginian,* it thought pertinent a decision that is plainly distinguishable, *General Committee* v. *Missouri-K.-T. R.R.,* 320 U.S. 323 (1943). That case involved a representational dispute between two unions in which one of them sued to prevent the carrier from dealing with the other with respect to certain issues, claiming that it was the sole representative authorized to negotiate about those issues. The plaintiff union relied on paragraphs First, Second, Fourth, and Ninth of Section 2 of the Act. In holding that the claim was not justiciable, this Court devoted most of its opinion to provisions other than Section 2 First. Its only mention of this provision appears in the following sentence, which the lower court in the case at bar cited: "But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands" (footnote omitted). 320 U.S. at 334.

But by this the Court meant only that the justiciability of the plaintiff's claim arising from a jurisdictional dispute was to be tested by reference to the statutory provisions specifically relating to such disputes, Section 2 Ninth (45 U.S.C. § 152 Ninth), rather than by reference to Section 2 First. The basis for the Court's holding was its conclusion that the Congress, by enacting Section 2 Ninth and thereby authorizing the National Mediation Board "to resolve a wide range of jurisdictional disputes between unions," evidenced an intent "not to leave their solution to the courts." 320 U.S. at 336. This was so even assuming that some types of jurisdictional disputes would not be within the Board's Section 2 Ninth jurisdiction, because "it

is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336-37. The legislative purpose reflected in the "more particularized commands" of Section 2 Ninth could not be circumvented by reliance upon the more general provisions of Section 2 First and 2 Second. Or, as the Court put it with respect to the latter provision, "Nor does § 2, Second make justiciable what otherwise is not." *Id.* at 334. But this does not mean that claims under Section 2 First which do *not* involve representational or jurisdictional disputes are not justiciable. *Virginian* held that they are; for there, as we have indicated, this Court affirmed an injunction commanding obedience to Section 2 First after the plaintiff union's representational dispute had been resolved by the National Mediation Board under Section 2 Ninth. That holding was not diluted by *Missouri-K.-T.*[19]

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[19] That this is the correct interpretation of *Missouri-K.-T.* is also clear from the passage in *Burley* we have already quoted (*supra* p. 52). There, the Court reaffirmed that *Virginian* established that Section 2 First imposes obligations that are "judicially enforceable," and in that connection simply cited *Missouri-K.-T.* with a "*cf.*" signal. Moreover, in other opinions this Court has explained *Missouri-K.-T.* as a case in which the Act did not depend upon judicial enforcement of a statutory command in view of prescribed administrative remedies, in contrast to *Virginian* where there was "no mode of enforcement other than resort to the courts." *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); see also *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300 (1943) ("If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control," citing *Virginian*); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-214 (1944); *Stark* v. *Wickard*, 321 U.S. 288, 303 n. 17 (1944).

5. *The Toledo, P. & W. R.R. case—enforcement of Section 8 of the Norris-LaGuardia Act.* There is one decision of this Court outside the area of Railway Labor Act case law that is relevant. It has to do with Section 8 of the Norris-LaGuardia Act (28 U.S.C. § 108), which is written in terms identical to Section 2 First. Section 8 also obliges parties to a labor dispute to "make every reasonable effort to settle." Accordingly, if enforcement of a standard of behavior framed in those terms were somehow alien to the judicial power—or so difficult as to give rise to a presumption of non-enforceability—Section 8 would be as much beyond the reach of that power—or as subject to such a presumption—as Section 2 First.

But in *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944), this Court enforced that provision against a railroad without suggesting that it was even remotely troubled about the prospect that courts would be called upon to decide on a case-by-case basis what facts do, and what do not, constitute a "reasonable effort" by the parties to a labor dispute. Following the lead of *Toledo,* courts have repeatedly decided whether railroads have violated Section 8.[20] Indeed, in the case at bar one of the defenses asserted

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[20] See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 613-14 (D.C. Cir. 1967); *Butte, A. & P. Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 268 F.2d 54, 60 (9th Cir. 1959); *Order of Ry. Conductors* v. *Spokane, P. & S. Ry.*, 366 F.2d 99, 105 (9th Cir. 1966); *Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 39 (2d Cir. 1962); *Brotherhood of R.R. Carmen* v. *Chicago & N.W. Ry.*, 354 F.2d 786, 794 (8th Cir. 1965); *Illinois Central R.R.* v. *Brotherhood of R.R. Trainmen*, 398 F.2d 973, 975 (7th Cir. 1968); *Long Island R.R.* v. *System Federation*, 368 F.2d 50, 53 (2d Cir. 1966); *Switchmen's Union* v. *Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968); *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 384 U.S. 238, 247 & n. 8 (1966).

by the union was that the C&NW had failed to comply with Section 8. See *supra* p. 8 n. 6.

To be sure, the question whether the Congress intended these statutes to be judicially enforceable must be tested by reference to the separate legislative history and function of each of the two provisions, Section 2 First and Section 8. It is conceivable—though we suggest most unlikely—that the Congress meant to place the railroads under judicial constraint by Section 8, but not the unions by Section 2 First. However, *Toledo* establishes at a minimum that the character of the judicial task in applying the "reasonable efforts" standard is no basis for arguing that Section 2 First is not judicially enforceable.[21]

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[21] Good faith bargaining provisions are also included in the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, and are enforceable. Thus, Sections 8(a)(5), 8(b)(3), and 8(d) (29 U.S.C. §§ 158(a)(5), (b)(3), and (d)) make it an "unfair labor practice" for an employer or a union to fail to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." The National Labor Relations Board is entrusted with the primary responsibility of adjudicating questions of compliance with these provisions, but the power of enforcement and review of the NLRB's orders lies in the courts. See Section 10 of the Act (29 U.S.C. § 160). Accordingly, the courts have established a large body of case law respecting the good faith bargaining obligation. See, *e.g.*, NLRB v. *American National Insurance Co.*, 343 U.S. 395, 409 (1952); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 487 (1960); *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). Note may also be taken of Sections 204(a)(1) and 209(a) of the Act (29 U.S.C. §§ 174(a)(1), 179(a)), which are phrased in terms similar to Section 2 First. The former provision illumines the good faith bargaining requirement that is enforced by the NLRB, see *NLRB* v. *Truitt Mfg. Co.*, *supra*, at 152; and the latter, which applies during the national emergency strike injunction period provided for in Section 208 of the Act (29 U.S.C. § 178), is enforceable by the courts. *United States* v. *International Longshoremen's Ass'n*, 116 F.Supp. 262, 266-67 (S.D.N.Y. 1953).

B. Decisions of Lower Federal Courts.

In the lower federal courts, a large body of case law has developed in the wake of *Virginian* affirming the judicial enforceability of Section 2 First both in strike injunction suits and in other contexts. Outside the Seventh Circuit, "the courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the act. . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963). We examine those decisions in some detail because, though they come from lower courts rather than from this Court, taken together they are impressive evidence that there has long existed a settled view that Section 2 First imposes obligations upon the parties as to which judicial relief may be sought. The principal decisions are from the Courts of Appeals for the Second, the Fourth, the Fifth, and the District of Columbia Circuits.

1. *The Fourth Circuit.* We begin with the decision that the Court of Appeals in the case at bar acknowledged was in conflict with its own, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (1969), *cert. den.*, 397 U.S. 926 (1970). In *Piedmont*, as in the case at bar, the formal procedures of the Act had been exhausted, the Mediation Board having terminated its services; but the carrier sought a strike injunction on the ground that the union had violated Section 2 First. The District Court in *Piedmont* granted a preliminary injunction because "the union failed to negotiate in good faith as required by the . . . Act." 416 F.2d at 637. The Court of Appeals affirmed. With respect to

the enforceability of Section 2 First, the Court of Appeals explained:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Id.* at 636.

This ruling was in accord with previous decisions by that Court of Appeals. It was the Fourth Circuit's 1936 decision in *Virginian Ry.* that was affirmed by this Court. *Virginian Ry.* v. *System Federation,* 84 F.2d 641 (1936), *aff'd,* 300 U.S. 515 (1937). Later, in *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36 (1953), the Court of Appeals directed the grant of injunctive relief to compel the carrier to bargain with the union after the National Mediation Board had released the case and all formal procedures of the Act had been exhausted. The Court cited Sections 2 First and 2 Ninth, together with this Court's decision in *Virginian,* and stated:

> "It was the duty of the railroad under this statute to bargain in good faith with the brotherhood .... An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain." *Id.* at 39-40.

See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45 n. 6 (1957), where,

in upholding a carrier's right to a strike injunction, the court in *dictum* suggested that the union's bargaining might not have "satisf[ied] the substantive requirement of negotiation imposed upon the Brotherhoods by the Act" and stated that the "negotiation required by the Act is the same 'good faith' bargaining required by the Labor Management Relations Act . . . ."

2. *The District of Columbia Circuit.* In *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (1967)—discussed *supra* pp. 8-9 in connection with the background of this dispute—the District Court held that a union's Section 6 notices served prior to the expiration of the Award of Arbitration Board No. 282 were premature and that the conferences on those proposals did not satisfy the Act's requirements because the carriers had refused to discuss the merits of the proposals, as they had a right to do. Genuine conferences, the District Court decided, had to be held before the union could invoke the services of the Mediation Board:

> "Under the Railway Labor Act, as it has been construed by the Supreme Court in . . . [*Virginian*] . . . there is a binding obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command.
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> . . . .
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> "There must be *bona fide* actual negotiation, and the courts will, by appropriate decrees, require negotiations." *Akron & B.B. R.R.* v. *Order of Ry. Conductors,* 253 F. Supp. 538, 539-40 (1966).

The Court of Appeals affirmed that determination, upholding a restraining order against a strike. 385

F.2d at 598, 614. Under the Seventh Circuit's view, that determination could not have been made; it would have been within the exclusive jurisdiction of the National Mediation Board, which had actually undertaken mediation with respect to a number of the notices in question. 385 F.2d at 597, 598.

Three other District of Columbia Court of Appeals decisions are in accord with *Akron*. Prior to that case, the Court of Appeals had affirmed a determination by the Railroad Retirement Board that a strike had "violated Section 2, First of the Railway Labor Act" and that therefore, the striking employees were not entitled to unemployment benefits. *Brotherhood of Ry. Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 43-44 (1956). At about the same time as *Akron*, the Court of Appeals refused to set aside pending appeal the portion of an injunction requiring a carrier to "exert every reasonable effort" to resolve its "major" dispute with a union, citing *Virginian* and stating: "The Supreme Court has held that a federal court may issue an injunction to compel compliance by the employer with the requirements of § 2 First." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 384 F.2d 323, 328 (1967). And finally, in a suit brought to enjoin a strike after exhaustion of all formal procedures of the Act—a suit that is also part of the historical background of this dispute (*supra* pp. 10, 11, 14)—the Court of Appeals, while reversing the District Court's determination that the union had violated Section 2 First by refusing to engage in multi-employer bargaining, laid down the rule that a court must decide "[w]hat constitutes good faith bargaining in the railroad industry . . . on an issue-by-issue evaluation" of the relevant

facts. *Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225, 229 (1967).[22]

In two recent cases, moreover, the United States District Court for the District of Columbia, guided by the Court of Appeals opinion in *Atlantic Coast Line,* issued strike injunctions after exhaustion of the formal procedures of the Act upon the basis of holdings that the unions had violated their statutory obligations respecting multi-employer bargaining. *Chicago, B. & Q. R.R.* v. *Railway Employes' Dept.*, 301 F. Supp. 603 (1969); *International Ass'n of Machinists* v. *National Ry. Lab. Conference,* 310 F.Supp. 905 (1970). In the latter case, for example, the Court held that "[b]y initiating and negotiating the dispute on an obligatory national basis and then striking the carriers on an individual basis it seems clear that the unions have violated their [Section 2 First] duty to 'exert every reasonable effort to make . . . agreements . . . and settle disputes.' " (Elipses by the court.) 310 F. Supp. at 912.[23] In yet two more recent cases the District Court issued temporary re-

[22] In issuing the strike injunction, the District Court had discussed the content of the "good faith bargaining" rule and had cited *Virginian* for the principle that "a fulfillment of this obligation may be compelled by judicial decree." *Atlantic C. L. R.R.* v. *Brotherhood of R. R. Trainmen,* 262 F. Supp. 177, 184 (1967).

[23] The *Chicago, B. & Q. R.R.* case was settled while an appeal was pending, and the District Court's judgment was ultimately vacated as moot. As to the *Machinists* case, while one of the several union parties has appealed, presumably it will not urge that Section 2 First is not justiciable, since none of the unions so contended in the District Court. Quite to the contrary, they contended that the railroads, in announcing that they would respond to a "whipsaw strike" by exercising their right to lock out, were threatening "a clear violation of . . . Section 2 First of the Railway Labor Act." 310 F. Supp. at 909.

straining orders in nearly identical circumstances, that is, all the formal procedures of the Act had been exhausted, but the railroads contended that the unions in abandoning multi-employer bargaining had violated Section 2 First. *Burlington Northern, Inc.* v. *United Transportation Union*, Civil Action No. 2026-70 (Order of July 7, 1970); *Delaware & Hudson Ry* v. *United Transportation Union*, Civil Action No. 2717-70 (Order of September 14, 1970). Finally, it is not without interest that in another recent District of Columbia suit, which was ultimately dismissed as moot, the UTU itself sought an injunction against a threatened lockout by the railroads on the ground that the lockout would be "in total disregard of their obligations imposed by Section 2, First and Seventh," contending that the "keystone of the Railway Labor Act is the duty prescribed by Section 2, First" and that accordingly the railroads should be enjoined. *Congress of Ry. Unions* v. *National Ry. Lab. Conference*, Civil Action No. 358-70, "Memorandum of Points and Authorities of Plaintiffs in Support of Motion for Preliminary Injunction," pp. 2, 8 (Feb. 5, 1970).

3. *The Second Circuit.* The Court of Appeals for the Second Circuit has also held Section 2 First to be enforceable by injunction. Its most recent decision is *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F.2d 1086 (1970). There the court held that a strike called to press bargaining demands in a "major" dispute in violation of a valid contractual moratorium on such demands would violate Section 2 First, and that accordingly a strike should be enjoined pending the District Court's determination of the validity of the contractual moratorium. Three earlier decisions by the

Court of Appeals are in accord.[24] In the first, the court, while rejecting a carrier's Section 2 First claim, did so on the merits rather than on jurisdictional grounds, *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 849 (1962); so too in the second, where the court rejected a *union's* Section 2 First claim respecting a carriers' strike insurance plan, *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 370-71 (1963);[25] and in the third, where a union had neither resorted to grievance procedures nor served a Section 6 notice, the court affirmed a strike injunction because the union's conduct "was a flagrant violation under the Act of the 'duty of all carriers, [and] their . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes. . . .'" *Long Island R.R.* v. *System Federation*, 368 F.2d 50, 53 (1966) (elipses by the court).

The district courts in the Second Circuit, moreover, have granted either temporary restraining orders or preliminary injunctions against strikes on Section 2 First grounds after exhaustion of the Act's formal procedures in the following cases: *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks*, 185 F. Supp. 350 (E.D. N.Y. 1960); *Long Island R.R.* v. *Brotherhood of R.R. Trainmen*, 185 F. Supp. 356 (E.D. N.Y. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961); *Pan*

[24] The earliest opinion of the Court of Appeals on the subject took note of but did not decide the question whether a strike could be enjoined on grounds of a violation of Section 2 First. *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (1961).

[25] The union advancing the Section 2 First claim in that case was the Brotherhood of Railroad Trainmen, one of the unions which merged into respondent UTU. See *supra* p. 6 n. 2.

American World Airways, Inc. v. *Flight Eng'rs Int'l Ass'n* (unreported) (E.D. N.Y. 1961), *rev'd on other grounds,* 306 F.2d 840 (2d Cir. 1962). See also *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 787-790, 793, 798 (S.D. N.Y. 1958) (*dictum*); *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478, 486-488 (S.D. N.Y. 1962), *aff'd,* 319 F.2d 366, 370 (2d Cir. 1963) (*dictum*); *Long Island R.R.* v. *International Bro. of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378 (E.D. N.Y. 1967); *KLM Royal Dutch Airlines* v. *Transport Workers,* 49 CCH Lab. Cas. ¶ 18,990 (E.D. N.Y. 1964) at p. 31,496. In granting relief in *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* the court observed with respect to Section 2 First that "[t]o effectuate the purposes of the Act and to prevent a mockery of its requirements such efforts [to settle] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance." 185 F. Supp. at 358. And in *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* the court responded to the union's argument that " '[t]here is no requirement in the Railway Labor Act that a Union bargain in good faith' " by saying: "To this the Court cannot agree. If compliance with the Act need only be perfunctory, the congressional mandate would be defeated and the purposes of the Act rendered nugatory." 185 F. Supp. at 353. In short, as the court in *KLM Royal Dutch Airlines* put it: "Good faith effort to resolve disputes and exhaustion of the process is a condition precedent to the use of economic pressures and forces." 49 CCH Lab. Cas. at p. 31,496.

4. *The Fifth Circuit.* In the Fifth Circuit also the justiciability of claims under Section 2 First is clearly established. In *United Industrial Workers* v. *Galves-*

ton Wharves, 400 F.2d 320, 324 (1968), the Court of Appeals observed that the District Court had correctly ordered the carrier to bargain in good faith because "the Act requires that . . . the parties must make every reasonable effort to settle their differences in conference" and because " 'one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties . . . to negotiate . . .' [citing *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, 721 n. 12]." In *Richardson* v. *Texas & N.O. R.R.,* 242 F.2d 230, 235 (1957), the court held a carrier liable for entering into racially discriminatory collective bargaining agreements because Section 2 First "imposed directly upon the Railroads the duty to 'make and maintain agreements' in compliance with the provisions of the Railway Labor Act. . . ." And in *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.,* 223 F. Supp. 296, 308 (M.D. Ga. 1962), *aff'd,* 324 F.2d 503 (1963), the District Court, in an opinion adopted by the Court of Appeals, dismissed a carrier's injunction suit as premature but, citing a number of decisions discussed in this brief, said that "should . . . a strike become imminent" the carrier could seek relief again "if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith." Finally, and most recently, in *Atlanta & W.P.R.R.* v. *United Transportation Union,* 307 F. Supp. 1205 (N.D. Ga. 1970), the court enjoined a strike on the ground that, though meetings between the parties had been held, they had not been of such character as to meet the statutory requirement of good faith bargaining and that therefore the procedures of the Act had not been exhausted:

> "What the Act positively requires, where a major dispute is involved, is genuine, good-faith nego-

> tiations . . . If either party refuses to negotiate it may be compelled to do so by mandatory injunction. This is necessarily true, else the whole elaborate 'cooling-off' procedures set up by the Act could be set at naught at the whim of either party, disrupting interstate commerce and fomenting the very evils which the Act was designed to prevent." *Id.* at 1210.

See also *National Airlines, Inc.* v. *International Ass'n of Machinists,* 416 F.2d 998, 1003 n. 3 (1969).[26]

The short of it is that there is a large and consistent body of federal case law rooted in this Court's decision in *Virginian* that reflects a settled conviction that Section 2 First imposes judicially enforceable duties. The decision of the Court of Appeals below stands alone.

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[26] Five District Court decisions in other circuits are relevant. In *Flight Engineers Int'l Ass'n* v. *Trans World Airlines, Inc.*, 305 F.2d 675 (8th Cir. 1962), the District Court, in an unreported decision subsequently vacated as moot, granted a strike injunction on the basis of a violation by the union of Section 2 First. In *Northwest Airlines, Inc.* v. *Airline Pilots Ass'n*, 185 F. Supp. 77, 80 (D. Minn. 1960), the District Court entertained an injunction claim grounded upon an asserted violation of Section 2 First, but found that the carrier had not "discharged . . . its burden of showing an absence of good faith" on the part of the union. In *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n.*, 41 CCH Lab. Cas. ¶ 16,739, at p. 23,837 (M.D. Tenn. 1961), the court found jurisdiction to issue a declaratory judgment because of Section 2 First, "which imposes upon all carriers and their employees the duty to exert every reasonable effort to make and maintain agreements. . . ." Finally, temporary restraining orders were issued in two cases in the crew consist controversy brought under Section 2 First after all the formal procedures of the Act had been exhausted. See note 7 *supra.*

III. BOTH THE COURTS AND THE NATIONAL MEDIATION BOARD ARE OF THE VIEW THAT THE BOARD IS NOT CHARGED WITH THE RESPONSIBILITY OF ENFORCING SECTION 2 FIRST.

As we noted in our introductory comments (*supra* p. 26), while it is not essential to our position to demonstrate that the National Mediation Board does not have the sort of adjudicatory responsibility ascribed to it by the lower court, it is, in our view, essential to respondent's position to demonstrate that the Board *does* have that enforcing role. Accordingly, in discussing the language and history of the statute, we have dealt with the materials that bear upon the role of the Board as well as those that bear upon the justiciability of Section 2 First. It remains to consider the views expressed by the courts respecting the functions of the Board, as well as the materials that disclose the Board's own conception of its responsibilities. For here again, as with respect to its ruling respecting justiciability, the lower court's view of the role of the Board is wholly unprecedented.

A. Judicial Opinions Respecting the Role of the National Mediation Board.

First, judicial opinions faithfully reflect the legislative purpose that, except with respect to representational disputes as to which Section 2 Ninth invests the Board with decisional authority, the Board has no adjudicatory role. As this Court said last Term, "[t]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158-159 (1969). And in *Elgin, J. & E. R. R.* v. *Burley*, 325 U.S. 711, 727 (1945), in interpreting the adjustment board provisions of the

Act, the Court observed that the "procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board," but that rather "[a]nother tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them." See also *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (2d Cir. 1961), where the court said that Section 2 First issues come to the courts "without the advance administrative screening provided under the National Labor Relations Act"; *Pan American World Airways, Inc.* v. *International Bro. of Teamsters*, 275 F. Supp. 986, 995 (S.D. N.Y. 1967), *aff'd on basis of opinion below sub nom. Brotherhood of Ry. Clerks* v. *Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), where the court said that "mediation proceedings are designed merely to bring the parties to an agreement" and that "[i]n such mediation the Board performs no adjudicative function. . ."; and *Brotherhood of Locomotive Fire. & Eng.* v. *NMB*, 410 F.2d 1025, 1030 n. 16 (D.C. Cir. 1969), where the court held that the Act has given the Mediation Board no jurisdiction to determine whether or not the proposals of the parties are bargainable within the meaning of the statute.

In addition, a recent opinion by the District of Columbia Court of Appeals contains a detailed examination of the nature of the services performed by the Board. *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527 (D.C. Cir. 1970). That opinion, which draws heavily upon the legislative history of the Act set forth earlier in this brief (*supra* pp. 39-41), supports our view that the Congress believed that granting ad-

judicatory power to the Board would compromise its mediatory role. The court had this to say:

> "... It is because the mediator acts as a catalyst for settlement rather than a judge that the Supreme Court was minded to say—'The concept of mediation is the antithesis of justiciability.' [*General Committee* v. *Missouri-K.-T. R.R.*, 326 U.S. 323, 337 (1943)]. ...
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> . . . . . .
>
> "The Railway Labor Act of 1926 was drafted by a committee representing railroads and railroad unions. ... The committee hearings reveal the essential ingredients and underlying philosophy of the proposal expressed by the principal spokesman [sic] for both labor and management. The mediation board is to operate in private conferences, not public sessions. The board will confine itself to the function of conciliation and persuasion, exerting its good offices to bring the parties together. It will not make findings, or even statements to the public, for these would undercut its status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future. Stressed and restressed was the need to retain the board in a position where it could operate by conciliation and persuasion, and the view that this position would be undercut if it gave statements or opinions, for the party standing condemned by the thrust of such a statement would or at least might conclude that the board was being unfair" (footnotes omitted). 425 F.2d at 538-39.

B. The Practice of the National Mediation Board.

This judicial understanding of the role of the Board This judicial understanding of the role of the Board is paralleled by the Board's own view of its authority. So far as we have been able to discover, the Board has

never exercised the statutory function that the lower court in the case at bar says it has. We have examined each of the thirty-five annual reports of the Board, its four published summaries of its work,[27] and the annual reports (1927-1934) of the predecessor Board of Mediation. While each of these documents describes the functions of the Board in detail, none of them so much as hints that the Board believes it has the authority or the duty respecting Section 2 First questions attributed to it by the court below. Rather, the Board consistently speaks of its role as confined to informal conciliation and mediation. Thus, for example, in its *Sixteenth Annual Report* (1950), the Board, in describing the structure of the Act and the character of the Board's responsibilities, said:

> "The National Mediation Board has no enforcement powers but acts purely as a mediatory agency, which means that its representative sits as a friendly officer of the United States Government, armed only with the weapon of friendly counsel and practical assistance in an effort to make collective bargaining successful" (p. 17).[28]

The report on the Mediation Board by the Attorney General's Committee on Administrative Procedure in 1941 agreed. As the Board observed in its *Seventh Annual Report* (1941) (p. 4), "the Committee remarked that:

> " 'Although the mediation activities of the Board are of very considerable importance in assuring uninterrupted transportation by rail and

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[27] *E.g., Administration of the Railway Labor Act by the National Mediation Board—1934-1957* (1958).

[28] See also, *e.g., Nineteenth Annual Report* (1953), pp. 22-23; *Twenty-fourth Annual Report* (1958), pp. 5-6; *Twenty-fifth Annual Report* (1959), pp. 4-5; *Twenty-sixth Annual Report* (1960), p. 5; *Twenty-seventh Annual Report* (1961), p. 5.

air, they do not lend themselves to procedural study. By definition they are of an informal nature, involving negotiation rather than decision.' "

Moreover, three former chairmen of the Mediation Board or its predecessor, the Board of Mediation, have indicated quite clearly that neither board passed upon questions such as whether the parties were in compliance with Section 2 First. Mr. Samuel E. Winslow, Chairman of the Board of Mediation, testifying before a Senate Committee considering the 1934 amendments to the Act, stated that the Board "has had no power of decision," that is, "[a]ny decision which the Board would have to make as between parties in interest," and that "there has been nobody in the mediation work to tell [the parties] that they must do this or they must do that." [29] The first Chairman of the National Media-

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[29] "To amend the Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 3266*, 73d Cong., 2d Sess. (1934), pp. 134, 138.

The Congress, while amending the Act so as to give the Board the authority to decide representational disputes (see p. 31 n. 10 *supra*), agreed with this appraisal of the Board's role respecting major disputes and noted that the amendments would work no change respecting major disputes. Thus, the Senate Committee said:

> "The present [mediation] board has many accomplishments to its credit. It has had many difficult tasks to perform. *Its powers are wholly persuasive.*" (Emphasis supplied.) *S. Rep. No. 1065*, 73rd Cong., 2d Sess. (1934), p. 3.

And the House Committee stated:

> "The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect." *H. Rept. No. 1944*, 73rd Cong., 2d Sess. (1934), p. 2.

tion Board, William M. Leiserson, wrote while in office that the mediators of the Board must "get the parties to agreement" "by mediation only" and "must not act as arbitrators, or they will render themselves useless for future mediation work."[30] And Mr. Howard Gamser, in a speech given just last year, pointed out some of the problems the Board would encounter if it attempted to depart from these principles and to enforce Section 2 First by refusing to release a case from mediation.[31]

That the Board has not attempted to decide Section 2 First questions—and also that it believes that 2 First is judicially enforceable—is confirmed by a brief *amicus curiae* for the United States in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D. N.Y. 1960), *reversed,* 292 F.2d 61 (2d Cir. 1961). There the United States not only argued that Section 2 First was justiciable, but it also indicated that the position of the Board was that the practice of the union in that

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[30] Leiserson, *Right and Wrong in Labor Relations* (1938), pp. 80, 81.

[31] In that speech, Mr. Gamser, Chairman in 1965 and 1968, said that "[s]ome airline spokesmen" had maintained that the Board should not begin mediation until it concluded that the parties had complied with their Section 2 First duties, and that the Board also should not release a case from mediation "if either party has not, in the opinion of the Board, 'made every effort to resolve the dispute . . . .'" That is, those "spokesmen" took the position adopted by the lower court in the case at bar. Mr. Gamser characterized this as advocating a "greater exercise of discretion than heretofore employed" by the Board, questioned whether there is "statutory language to allow the Board to make such a determination," and discussed the procedural steps—such as investigations and hearings—that might have to be employed. "The Role of Mediation in Airline Labor Disputes," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 506, 510, 511 (1969).

case in submitting negotiated contracts to a referendum of its membership was contrary to the requirements of Section 2 First. Had the Board followed the course staked out for it by the opinion of the lower court in the case at bar, it would have decided the Section 2 First question against the union and would not have terminated mediation—thereby foreclosing the union from striking—until the union abandoned the referendum practice.[32]

None of this is to say that the Board, in the exercise of its conciliatory function, is obliged to ignore actions of the parties that might, on judicial scrutiny, be adjudged violations of Section 2 First. The point is simply that under the statute the Board has no obligation one way or the other on that score. Under Section 5 it need only decide whether the prospects of settlement would be enhanced by its continuing mediation or whether they would not. See *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527 (D.C. Cir. 1970). If

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[32] Commentary on the Board's role is sparse. However, Mr. Donald Richberg, the principal draftsman of the 1926 Act, seemed clearly to share the view that the Mediation Board does not make these kinds of decisions. In his book, *Tents of the Mighty* (1930), p. 196, Mr. Richberg, in explaining the provisions of the Act, stated that the Board's "mediators cannot issue orders to anyone" and that in view of this "one senator referred to mediation as some more of the 'rose-water' process." Some years later in *Labor Union Monopoly* (1957), p. 30, Mr. Richberg contrasted the "gentle functioning of the Railway Mediation Board, which has little power to decide anything" with the NLRB with its "sweep of decisions." See also Garrison, "Labor Relations in the Railroad Industry," 17 *Proc. Academy of Pol. Science*, 163, 166 (1937) ("Congress . . ., in creating the new Mediation Board, gave it no judicial functions."); Redenius, "*Airlines: The Railway Labor Act or the Labor Management Relations Act?*," 20 *Lab. L.J.* 293, 299 (1969).

the party serving the Section 6 notice simply refuses to engage in any meaningful negotiations, in one situation the Board might conclude to retain jurisdiction in the hope that this would work a change in attitude, and in another it might conclude that such a result would more likely obtain were mediation terminated. So, too, with respect to Section 2 First questions of a less subjective character, such as restriction on the bargaining authority of the negotiators by referendum requirements, as in the *Chicago, R.I.* case cited above, or by union convention directives respecting the sort of agreement to be negotiated, as in the case at bar and in the *Piedmont Aviation* case also cited above. See *supra* pp. 61-62, 76-77. Though in the *Chicago R.I.* case the Board thought the referendum requirement a breach of Section 2 First, it concluded that no useful purpose would be served by its refusing to terminate its services until the union rescinded that requirement. It evidently took the same view in *Piedmont* and in the case at bar with respect to the union resolution limiting the authority of the negotiators—an action that the Fourth Circuit, as we have noted, regarded as inconsistent with Section 2 First. Under our view of the statute, the Board was free so to act.

CONCLUSION

All the relevant considerations—the language of the Act, its legislative history, its purposes, its construction by this Court as well as the lower courts, and the practice of the National Mediation Board—converge on the same point: *Section 2 First is enforceable by the courts, not by the Board.* Accordingly, the judgment of the Court of Appeals should be reversed and

the case remanded for a determination respecting the merits of petitioner's claim.

Respectfully submitted,

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